RECENT CASES.

AGENCY—AUTHORITY OF TRAVELING SALESMAN TO SELL HIS SAMPLES—A traveling salesman was supplied by his employer, the plaintiff, with samples and instructions that they were to be returned intact and that "if a number were missing, he was to pay for it." The salesman pledged a trunk containing samples with the defendant, who relied in good faith on his representations that he was authorized to sell them. *Held:* An agent selling by sample needs them in order to accomplish the purpose of his agency; therefore, the natural inference is that the samples themselves were not for sale. And in this case, since the instructions did not amount to express authority to the agent to sell any part of the samples, the pledgee is liable to the principal in action to recover them. Cleveland Knitting Mills v. Shaff, 145 N. Y. S. 109 (1914).

In the few jurisdictions in which the question has arisen, it has been decided as in the principal case, that a traveling salesman has no implied authority from the nature of his employment to sell his samples. Savage v. Felton, 1 Colo. App. 148 (1891); Hibbard v. Stein, 45 Ore. 507 (1904); Kohn v. Washer, 64 Tex. 131 (1885). No authority to sell is to be inferred from the mere possession of goods. Cole v. Northwestern Bank, L. R. 10 C. P. 354 (Eng. 1875). The agent must have at least the apparent right of disposal, in order to bind his principal by a sale. Saltus v. Everett, 20 Wend. 267 (N. Y. 1838). Where the principal sues his agent's vendee for the purchase price, a previous invalid sale of samples will of course be ratified. Bailey v. Pardridge, 134 Ill. 188 (1890).

ASSAULT AND BATTERY—SELF-DEFENSE—INJURY TO BYSTANDER—A sheriff, in making the arrest of an escaping felon, was compelled to shoot in self-defense. His shot missed his assailant, and struck a bystander. *Held:* The sheriff is not liable to the bystander for his injuries unless he was guilty of negligence. Shaw v. Lord, 137 Pac. Rep. 885 (Okla. 1914).

The decision in the principal case shows clearly the basis of the rule of self-defense, that a man when attacked may use reasonable force to repel that attack and is not himself guilty of an assault until he exceeds this amount. The rule might be thought to be based on the theory that the man who first commenced the attack should not object if the force offered by him was in turn repelled by force. But, as appears from the decision in the principal case, the theory at the foundation of the self-defense rule is that the law so recognizes the necessity for allowing a man who is attacked to use the primitive methods of self-help that it considers an act which would otherwise be unlawful, to be lawful if done in self-defense. Thus the rule of self-defense is, not that the aggressor because he wrongfully commenced the fight is precluded from recovery for a *wrongful* assault, but that an assault committed in self-defense is a lawful act, upon which no recovery by the aggressor or any one else can be predicated, unless negligence is shown.

The few decisions on this question are in accord with the principal case. Morris v. Platt, 32 Com. 75 (1864); Paxton v. Boyer, 67 Ill. 132 (1873). *Contra,* Bessey v. Oliot, L. Raym. 468 (Eng. 1682).

BANKRUPTCY—LIQUOR LICENSE AS AN ASSET—A license to sell liquor issued to the bankrupts was unexpired at the time of their adjudication. A rule of court provided that all licensees against whom no remonstrance was filed would be presumed to be entitled to a renewal of their licenses. *Held:* The right to the unexpired term, with its contingent right of a renewal, ceased to belong to the bankrupts and both passed to a purchaser under a sale by the brankrupts' receiver, so that the bankrupts could properly be compelled to join in such proceedings as were necessary to make the sale

effective for the benefit of creditors. *In re* Doyle and Son, 209 Fed. Rep. 1 (1913).

In practically all jurisdictions there are statutes providing for the transfer of liquor licenses under certain prescribed conditions. Universally in bankruptcy cases the courts have held that the unexpired term, altho a mere contingency, has a market value, and so is an asset of the bankrupt. *In re* Becker, 98 Fed. Rep. 407, 2 N. B. N. Rep. 245 (1899); Fisher v. Cushman, 103 Fed. Rep. 860, 43 C. C. A. 381, 51 L. R. A. 292 (1900); Deggender v. B. & M. Co., 83 Pac. Rep. 898, 4 L. R. A. (N. S.) 626 (Wash. 1906). It is clear that the market value and corresponding worth of the unexpired term is increased by a rule of court such as we have in the principal case, and it will be held an asset in the hands of the trustee in bankruptcy. *In re* Weesel, 173 Fed. Rep. 718 (1909). So also where a rule of the licensing power practically assures a transfer to the purchaser from the trustee. *In re* Fisher, 98 Fed. Rep. 89 (1899). In New York the Liquor Tax Law of 1896 gives a license the characteristics and some of the essential elements of property. People v. Durante, 19 App. Div. 292, 54 N. Y. Supp. 1073 (1897).

In some jurisdictions, although there are statutes authorizing or permitting transfers, a license is considered a mere personal privilege, intangible, and not a property right. Voight v. Board of Excise, 59 N. J. L. 358, 36 Atl. Rep. 686, 37 L. R. A. 292 (1896); Bonnie & Co. v. Perry, 117 Ky. 459, 78 S. W. Rep. 208 (1904). So it is not subject to a chattel mortgage. Feigenspan v. Mulligan, 51 Atl. Rep. 191 (N. J. Eq. 1902). A license cannot be assigned. State v. Lydick, 11 Neb. 366, 9 N. W. Rep. 560 (1881). Nor does it pass to the personal representatives of a decedent. *In re* Grimm, 181 Pa. 223, 37 Atl. Rep. 403 (1897). On the other hand, it seems that if the personal representative of the deceased licensee secures a renewal or transfer of the license to himself, and conduct the business as part of the business of the estate of his testator, it will not become an asset of the representative individually. Graeser's Estate, 230 Pa. 145, 79 Atl. Rep. 242 (1911).

CONTRACTS—LEGALITY—CUSTODY OF CHILDREN—The plaintiff who had been separated from her husband contracted with her father-in-law in consideration of the latter's agreement to provide for her during her lifetime, to transfer to him the custody and control of her child. *Held:* Since the contract was clearly for the benefit of child, by reason of the father-in-law's superior ability to support the child, it was not void as against public policy. Upon performance by the plaintiff, she was entitled to specific performance. Clark v. Clark, 89 Atl. Rep. 404 (Md. 1913).

As a general rule in England and in the majority of American jurisdictions, a contract whereby a parent divest himself of his parental duty and power by disposing of his right to the custody and control of his child, is void as contrary to public policy. Hamilton v. Hector, L. R. 6 Ch. App. 701 (Eng. 1871); Kuhn v. Breen, 47 Ia. 435 (1877); Chopsky v. Wood, 26 Kan. 650 (1881); Grime v. Borden, 166 Mass. 198 (1896); Hibette v. Baines, 78 Miss. 695 (1900), unless made in accordance with the provisions of a statute. Sargent v. Sargent, 106 Cal. 541 (1895); Miller v. Wallace, 76 Ga. 479 (1886). Accordingly, the parent may repudiate the contract and regain possession of the child at any time, provided that he is a fit person to have control. Sheers v. Sterns, 75 Wis. 44 (1889). However, where the custody of the child has been relinquished by the parent, and the former has become bound by ties of affection to its custodian, it will not be restored to the parent, if such restoration is not for the best interest of the child. Hoxsie v. Potter, 16 R. I. 374 (1888); Merritt v. Swimley, 82 Va. 433 (1886).

There are some jurisdictions which take the view of the principal case that a contract leading to the separation of a child from its parent is not void, provided that it is not to the detriment of the child. Enders v. Enders, 164 Pa. 266 (1894); Van Dyne v. Vreeland, 11 N. J. Eq. 370 (1857); Fletcher v. Hickman, 50 W. Va. 244 (1901).

A third person who abducts a child cannot attack the validity of the contract under which the custody of such child has been transferred. Clark v. Bayer, 32 Ohio, 299 (1877). It has been held that an agreement between the father and mother whereby the former divests himself of the custody of his children is invalid, unless made under a court's direction. Johnson v. Terry, 34 Conn. 259 (1867). An antenuptial agreement providing for the religious training of future offspring is invalid. *In re* Agar-Ellis, L. R. 10 Ch. Div. 49 (Eng. 1878).

CRIMINAL PROCEDURE—IS THE ALLOCATUS NECESSARY?—It is not reversible error, even in capital cases, not to ask the prisoner if he has any reason to give why sentence should not be passed. Dutton v. State, 91 Atl. Rep. 417 (Md. 1914).

In this case the Court of Appeals of Maryland has joined the very small minority of jurisdictions. The almost unanimous doctrine is that in capital offenses the accused should be asked if he has anything to say why sentence should not be pronounced. Rex v. Speke, 3 Salk. 358 (Eng. 1691); State v. Ikenor, 107 La. 480 (1902); Jones v. State, 51 Miss. 718 (1875); West v. State, 2 Zab. 212 (1849); State v. Johnson, 67 N. C. 55 (1872); Messner v. People, 45 N. Y. 1 (1872); Hamilton v. Comm., 16 Pa. 129 (1851); Dougherty v. Comm., 69 Pa. 286 (1871); Ball v. U. S., 140 U. S. 118 (1891); Schwab v. Berggren, 143 U. S. 442 (1893). In felonies less than capital, opinions are divided as to the necessity for the allocatus. Some of the cases holding it necessary are: Safford v. People, 1 Par. Cr. 474 (N. Y. 1854); Croker v. State, 47 Ala. 53 (1872); People v. Walker, 132 Cal. 237 (1901); State v. Kile, 231 Mo. 59 (1910); McCormick v. State, 66 Neb. 337 (1903); Comm. v. Preston, 188 Pa. 429 (1898). Cases holding it unnecessary are: Lamb v. People, 219 Ill. 399 (1906); State v. Lund, 51 Kan. 1 (1893); State v. Sims, 117 La. 1036 (1906); Jeffries v. Com., 12 Allen, 145 (Mass. 1866); U. S. v. Sena, 15 N. M. 187 (1909); Jones v. State, 51 Miss. 718 (1875); State v. Nagel, 136 Mo. 45 (1896); State v. Sally, 41 Ore. 336 (1902); Turner v. U. S., 66 Fed. Rep. 287 (1895). In misdemeanors, the allocatus has never been held necessary at the common law, State v. Bradley, 30 La. Ann. 326 (1878), though a statute in Ohio has changed the common law in this respect.

Upon being asked whether he has anything to say, the accused may move in arrest of judgment if he has not done it before: Popish Lord's Case, 7 How. St. Tr. 1217 (Eng. 1680); or he may plead a pardon should he have one, Rex v. Garside, 2 A. & E. 266 (Eng. 1834); or existing insanity, State v. Bethrine, 88 S. C. 401 (1911).

In view of the fact that under our modern practice it is practically impossible for the prisoner to suffer from the omission of the allocatus, and also due to the fact that the various reasons originally given for this practice are not applicable at the present day, there seems to be a growing tendency, even where capital punishment is inflicted, to dispense with this ceremony, or at least to consider it not essential.

Furthermore, even where it is held to be a necessary formality, it is the prevalent opinion that in case of an omission thereof, the entire record need not therefore be reversed, but only this part, and a new sentence under due steps may be given, in other words, the error only affects the sentence, and not the verdict. Reynolds v. State, 68 Ala. 502 (1881); Reech v. State, 15 Fla. 591 (1876); State v. Jennings, 24 Kan. 642 (1881); Dodge v. People, 4 Neb. 220 (1876); McCue v. Comm., 78 Pa. 185 (1875); Comm. v. Preston, 188 Pa. 429 (1898); State v. Trezevant, 20 S. C. 363 (1883).

CRIMINAL PROCEDURE—MUST INDICTMENT NEGATIVE PROVISO IN STATUTE?—The Connecticut Act of 1911, in section one, penalizes any person selling food in package form, unless the net quantity of the contents be marked on the outside of the package. Section three, however, provides that no penalty shall be enforced for any violation arising from the sale of

food prepared and inclosed in package form prior to eighteen months after the passage of the act. *Held:* An indictment or information under this statute is sufficient, though it does not negative the above mentioned proviso; the fact that the sale is within the proviso is purely a matter of defence. State v. McGee, 91 Alt. Rep. 270 (Conn. 1914).

There has been much doubt in the cases as to when it is necessary to expressly negative the proviso in a statute. The authorities are not at all consistent, and have reached conclusions dependent largely upon the position of the proviso in the statute—whether in the enacting clause or in a separate section, *etc.* The underlying principle is well settled, *viz.:* that the indictment on a statute, like any other indictment, must show a *prima facie* case, and it need not do more. Therefore, if the statute has exceptions, provisos, and the like, those which are affirmative elements in the offense, must be negatived in averment, while those in the nature of defense may be disregarded. In the application of this principle, the courts have looked to the location of the several clauses or provisions in the statute, and have laid down the broad general doctrine that where the excusing matter stands in clauses, separate from the main provision, "it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the proviso it contains. Nor is it even necessary to allege that he is not within the benefit of its proviso, though the purview should expressly notice them, as by saying that none shall do the act prohibited, except in the cases thereinafter excepted. For all these are matters not anticipated, but which are more properly to come from the prisoner." But if exceptions are "in the enacting clause, it will be necessary to negative them, in order that the description of the crime may in all respects correspond with the statute." 1 Chitty Cr. L. 283 b. 284, and cases there cited; *Ex parte* Horne, 154 Cal. 355 (1908); Richardson v. State, 77 Ark. 321 (1906); Ferrell v. State, 45 Fla. 26 (1903); Ritchens v. State, 116 Ga. 847 (1902); Ferners v. State, 151 Ind. 247 (1898); State v. Knowles, 90 Md. 646 (1900); People v. Allen, 122 Mich. (1896); State v. Call, 121 N. C. 643 (1897); State v. Hutchinson, 55 Ohio St. 573 (1897); State v. Doering, 194 Mo. 398 (1906); State v. Marks, 65 N. J. L. 84 (1900).

The editor of the 1913 Edition of Bishop on Criminal Procedure, however, takes the position that this broad distinction disregards the nicer shades discoverable in the later decisions, and from a more exact study of the decisions lays down eight rules governing this subject, as follows:

(1) The negative of all exceptions in the enacting clause should be averred, unless such in form and substance that an affirmative offense will appear without. (2) A negative description of the offense must be alleged. (3) However mutually located are the provisions of a statute, an indictment thereon, as on the common law, must aver all negatives necessary to show affirmatively an offense. (4) As on the common law, so on a statute, the indictment need not negative matter of defence. (5) In general, an exception or proviso which is not in the enacting clause, whether in the same section with it or not, need not be negatived. (6) Where there is in the enacting clause, a reference to an exception or proviso more fully stated in a separate clause or statute, the indictment is required to negative it or not, according as the form of the expression and the nature of the matter render the latter an element in the *prima facie* offense or in the defence. (7) A negative not required by law may be rejected as surplusage. (8) A negative averment need not be so minute, or so nearly in the statutory words, as must an affirmative one; but any negation in general terms, covering the entire substance of the matter, will suffice. Bishop on Crim. Pro. (1913 Ed.), Vol. II, §§636-642.

INSURANCE—PROOF OF DEATH—PRESUMPTIONS—The assured, who had been on good terms with his wife and steadily employed, left home on November 15, 1903, and was never seen or heard of again. His wife could

not actually prove that he was dead. *Held:* The usual presumption that continued absence from one's last and usual residence raises a presumption of death applies and the wife is not barred from recovery from the fact that she cannot bring actual proof of death. Mannheimer v. Independent Order of Ahawas Israel, 145 N. Y. S. 74 (1914).

This decision represents the weight of modern authority where there is no provision in the insurance policy barring any claim based upon disappearance or that actual proof of death shall be a condition precedent to recovery on the policy. Kelly v. Supreme Council, 46 App. Div. 79 (N. Y. 1899).

The presumption of death after absence for seven years is an administrative presumption of law. It was found necessary in order that estates should be distributed, that persons should be able to re-marry without criminal consequences if the absent husband of wife were not dead, *etc.* There is no presumption as to the time at which death takes place. Davie v. Briggs, 97 U. S. 628 (1878); Lynan v. Doe, 7 L. J. Exch. 335 (1837); McCarter v. Camel, 1 Barb. Ch. 455 (1846), although the logical inference from facts introduced in evidence may warrant the jury in finding that the death occurred well within the statutory period. Whiting v. Nicoll, 46 Ill. 230 (1867); Chapman v. Kullman, 191 Mo. 237 (1905). On the other hand, the presumption of death may be rebutted by proof that the absentee is a fugitive from justice, Mutual Ben. L. Ins. Co. v. Martin, 108 Ky. 11 (1900); Wolff's Estate, 12 W. N. C. 535 (Pa. 1883), or has some other reason for concealing his identity. Donovan v. Twist, 93 N. Y. S. 990 (1905). In the latter case the burden of producing rebutting inferences is on the party against whom the presumption operates. Magness v. Modern Woodmen of America, 123 N. W. Rep. 169 (Iowa, 1909); Hoyt v. Newbold, 45 N. J. L. 219 (1883), and until such rebutting evidence is produced the presumption establishes a *prima facie* case. Willcox v. Trenton Potteries Co., 64 N. J. Eq. 173 (1902); Magness v. Modern Woodmen of America, *supra.*

For a thorough discussion of presumption, see 62 UNIV. OF P. L. R. 585.

LIBEL—PRIVILEGED COMMUNICATION—MALICE—The defendant, the father of a pupil in a district school, wrote a letter to the county superintendent of schools, which contained charges of impropriety by another pupil upon the school grounds during school and recess hours. *Held:* The communication was qualifiedly privileged. Hausen v. Hausen, 148 N. W. Rep. 457 (Minn. 1914).

A communication made by one on a subject in relation to which he has an interest or a moral duty, to another having a correspoding interest or duty, is conditionally privileged. Kluick v. Colby, 46 N. Y. 427 (1871); Caldwell v. Story, 107 Ky. 70 (1889). A qualified privilege attaches to a communication addressed by a member of the public to a public officer. Tyree v. Harrison, 100 Va. 540 (1902); Bingham v. Gaynor, 125 N. Y. Supp. 216 (1910). The communication being privileged, the burden is cast upon the plaintiff to show malice in fact. Coloney v. Farrow, 5 App. Div. 607 (N. Y. 1896); Denver P. W. Co. v. Hallaway, 34 Colo. 432 (1910). The law does not imply malice from the communication itself, nor from its falsity, as in the ordinary case of libel. Hebner v. Great Nt. Ry. Co., 78 Minn. 289 (1900). Malice may be established by the unnecessary publicity of the communication. Fresh v. Cutter, 73 Md. 87 (1890). And the privilege may be lost if the publication is made maliciously or contains matter unnecessary for the protection of the defendant's interest. Wilson v. Barnett, 45 Ind. 163 (1873). Where the communication is absolutely privileged, the question of malice is immaterial. Lauder v. Jones, 13 N. D. 525 (1904). But a qualifiedly privileged communication requires both an occasion of privilege and the use of that occasion in good faith. Wright v. Lothrop, 149 Mass. 385 (1889); Conroy v. Pittsburgh "Times," 139 Pa. 334 (1891); Hollenbeck v. Ristine, 105 Ia. 488 (1898).

It is held that this principle does not apply where the communication is irrelevant to the occasion, even though the occasion is privileged. Blakeslee v. Carroll, 64 Conn. 223 (1894); Hines v. Shumaker, 97 Miss. 669 (1911). In the course of judicial proceedings, however, even irrelevant statements are at least conditionally privileged. Lauson v. Hicks, 38 Ala. 229 (1862); Myers v. Hodges, 53 Fla. 197 (1907).

LIBEL—PRIVILEGE—PLEADINGS—The defendant, in an affidavit in support of its motion for new trial, knowingly made the false and malicious statement that illicit relations existed between the plaintiff and her principal witness. *Held:* Since the statement was relevant, for the reason that at the trial the witness had appeared disinterested, it was absolutely privileged and could not be the subject of an action for libel. Keeley v. Great Northern Rwy., 145 N. W. Rep. 664 (Wis. 1914).

This decision is in accord with the great weight of authority in the United States. Buschbaum v. Herriot, 63 S. E. Rep. 645 (Ga. 1909); McLaughlin v. Cowley, 127 Mass. 316 (1879); Jones v. Brownlee, 161 Mo. 258 (1901); Kemper v. Fort, 219 Pa. 85 (1907); Link v. Moore, 84 Hun 118 (N. Y. 1895); King v. McKissick, 126 Fed. Rep. 215 (1903). In England, absolute privilege is extended to statements in pleadings, although they are false, malicious and irrelevant. Hudson v. Pare (1899), 1 Q. B. 455. In Canada, such statements are privileged only when relevant and made in good faith. Charlebois v. Bourassa, Mont. L. Rep. 5 Super. Ct. 423 (1889). Allegations in pleadings are only conditionally privileged in Louisiana. Dunn v. Southern Ins. Co., 116 La. 431 (1906).

The doctrine of absolute immunity, intended to protect the interest of the public and to foster unrestricted administration of justice, obviously leaves the party defamed without an adequate remedy. An indictment for perjury may of course be brought. Doyle v. O'Doherty, Car. & M. 418 (Eng. 1842). The court will sometimes order scandalous matter to be expunged from the pleadings. Christie v. Christie, L. R. 8 Ch. App. 499 (1872). But, even for matter so expunged, an action for damages will not lie. Kennedy v. Hilliard, 10 Ir. C. L. R. 195 (1859). It has been intimated that where a complaint has been filed as a cloak to libellous statements, the privilege will be lost, notwithstanding that the allegations were relevant. Dada v. Piper, 41 Hun 254 (N. Y. 1886). However, such a qualification to the general rule has been declared unsound. Runge v. Franklin, 72 Tex. 585 (1889).

Where libellous statements are published before a court having no jurisdiction over the subject matter, they are only conditionally privileged. Johnson v. Brown, 13 W. Va. 71 (1878). But if the court has such jurisdiction, absolute immunity will not be lost for the sole reason that the declaration fails to state a cause of action. Wilson v. Sullivan, 81 Ga. 238 (1888).

NEGLIGENCE—LIABILITY OF CHARITABLE INSTITUTIONS FOR TORTS OF SERVANTS—A patient, while unconscious from the influence of anesthetics, was placed in a bed in which a hot water bottle had been negligently left by an employee of the hospital, and was severely burned. *Held:* The hospital is liable, not having used ordinary care in the selection and retention of its servant. St. Paul's Sanitarium v. Williamson, 164 S. W. Rep. 36 (Tex. 1914).

There is a considerable difference in judicial opinion as to when, if at all, a charitable institution should be liable for the negligence of its servants. Some jurisdictions, notably Pennsylvania, hold that as a matter of public policy, charitable institutions are exempt from all liability. The basis of this view is that otherwise the trust fund, given for the purposes of charity, might be entirely destroyed and diverted from the purposes for which the donor intended it. Boyd v. Fire Ins. Patrol, 120 Pa. 624 (1888); Gable v. St. Francis, 227 Pa. 254 (1910); Jenson v. Maine Ear and Eye Infirmary, 107 Me. 408 (1910); Perry v. House of Refuge, 63 Md. 20 (1884). In New

York it is held that the exemption from liability applies only to those who are the recipients of the favor of charitable institutions, not to the rights of others. Hordern v. Salvation Army, 199 N. Y. 233 (1910). Other jurisdictions, in accord with the principal case, hold that a hospital is only liable if it has not used due care in the selection and retention of its servants. Powers v. Massachusetts Homeopathic Hospital, 101 Fed. Rep. 896 (1900); MacDonald v. Mass. General Hospital, 120 Mass. 432 (1876); Texas Central R. R. Co. v. Zumwalt, 103 Tex. 603 (1910).

In any event the fact that the institution receives pay from those who receive the benefit of its charity is immaterial; the theory being that such amounts are not for private gain, but to enable the institution to more effectually carry out the purpose for which it was formed. Powers v. Mass. Homeopathic Hospital, *supra;* Gable v. Sisters of St. Francis, *supra.*

PROPERTY—LATERAL SUPPORT—WITHDRAWAL OF SUPPORT—A lot owner erected a building on his property within three inches of his neighbor's line. Subsequently the neighbor, in preparing for the erection of a building on his lot, excavated to a point below the wall of the building mentioned and because of the withdrawal of the lateral support it was injured. *Held:* There is no liability to the party injured for more than nominal damages. McKeand v. Skirboll, 55 Pa. Sup. Ct. 28 (1913).

It is well settled that the owner of land is entitled to lateral support for his ground in its natural state. Farrand v. Marshall, 19 Barb. 380 (N. Y. 1853); Urer's Appeal, 81½ Pa. 203 (1874); Gilmore v. Driscoll, 122 Mass. 199, 23 Am. St. Rep. 312 (1877). Nor will the right be lost by the mere placing of structures upon the land, where the structures are of such character as not to materially increase the weight or pressure. Oneil v. Harkins, 8 Bush, 650 (Ky. 1871); White v. Tebo, 43 N. Y. App. Div. 418, 60 N. Y. Supp. 231 (1899). But the right does not include the support for substantial superstructures placed upon the land which materially increase the weight and pressure. Thurston v. Hancock, 12 Mass. 220, 7 Am. Dec. 57 (1815); Transportation Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336 (1878); McGettigan v. Potts, 149 Pa. 155, 30 W. N. C. 137 (1892). It seems clear, however, that the excavations causing the removal of the lateral support and resultant damage to the superstructure must be carried on with due care. Negligence will create liability for all damages resulting. Gildersleeve v. Hammond, 109 Mich. 431, 33 L. R. A. 46, 67 N. W. Rep. 519 (1896); Bonaparte v. Wiseman, 89 Md. 12, 44 L. R. A. 482 (1899); Hammicker v. Lepper, 20 S. D. 371, 107 N. W. Rep. 202, 6 L. R. A. (N. S.) 243 (1906). Even the fact that there is an intervening lot will not prevent the jury from finding that, under the circumstances, there was negligence. Witherow v. Tannehill, 194 Pa. 21, 44 Atl. Rep. 1088 (1899). While there is no imperative obligation or duty to notify the adjoining owner of one's intention to excavate, the modern tendency is to hold failure to give notice sufficient to justify the jury in finding that there is negligence. Bonaparte v. Wiseman, *supra;* Schultz v. Byers, 53 N. J. L. 442, 22 Atl. Rep. 514, 13 L. R. A. 569 (1891); Spohn v. Dives, 174 Pa. 474, 34 Atl. Rep. 192 (1896). It has been held that the employment of a skilled contractor to make the excavations is a good defense to an imputation of negligence. Myers v. Hobbs, 57 Ala. 175, 29 Am. Rep. 719 (1876); but see *contra,* Bonaparte v. Wiseman, *supra.*

SALES—STATUTE OF FRAUDS—DELIVERY AND RECEIPT OF SAMPLE—The defendant agreed orally to sell cloth to the plaintiff to comply with certain samples. The latter contends that acceptance and receipt of the samples takes the agreement out of the statute. *Held:* Delivery of a sample forming no part of the bulk to be bought and paid for is not such a delivery as will satisfy the statute. Gold v. Gross, 164 N. Y. S. 164 (1914).

This decision is in accord with the prevailing rule that acceptance and receipt of samples which are not part of the goods sold is not sufficient to

satisfy the statute. Moore v. Love, 57 Miss. 765 (1880); Carver v. Lane, 4 E. D. Smith, 168 (N. Y. 1855); Durson v. Petersmeyer, 109 Iowa, 233 (1899). Otherwise if the samples are a part of the property sold, *i. e.*, the contract of sale is an entire one. Hinde v. Whitehouse and Galan, 7 East, 558 (Eng. 1806); Brock v. Wiener, 37 Hun, 609 (N. Y. 1885).

There is a conflict of opinion as to what acceptance is necessary to satisfy the statute. In some jurisdictions the acceptance must be made by some act or conduct by the buyer manifesting an intention to accept the goods as satisfying the contract. This is the same acceptance as is necessary to the passage of title. Shindler v. Houston, 1 N. Y. 261 (1848); Rodgers v. Jones, 129 Mass. 420 (1878); Mechanical Boiler Cleaner Co. v. Kellner, 62 N. J. L. 544 (1898). In other jurisdictions an absolute acceptance of the goods as meeting the contract is unnecessary, but an acceptance which could not have been made without admitting the contract and that the goods were sent under it is sufficient. Page v. Morgan, 15 Q. B. D. 228 (Eng. 1885); Smith v. Stoller, 26 Wis. 671 (1870). But even in these jurisdictions mere inspection of the goods does not amount to an acceptance. Taylor v. Smith, 2 Q. B. 65 (Eng. 1893).

The receipt required is a taking by the buyer of actual control of the goods after they have been delivered by the seller. Hinchman v. Lincoln, 124 U. S. 38 (1888); Knight v. Mann, 120 Mass. 219 (1876); Michael v. Curtis, 60 Comm. 363 (1891). If the property remains in the seller's possession he must have lost his lien and agreed to hold as bailee of the buyer. Devine v. Warner, 76 Conn. 229 (1903); Safford v. McDonough, 120 Mass. 290 (1876). If the property is in the possession of a third person as bailee of the vendor, such third person must agree to hold as bailee for the vendee. Gooch v. Holmes, 41 Me. 523 (1856); Marsh v. Rouse, 44 N. Y. 643 (1871).

SPECIFIC PERFORMANCE—PAROL ANTE-NUPTIAL AGREEMENT IN CONSIDERATION OF MARRIAGE—An oral ante-nuptial agreement by a prospective husband in consideration of marriage, to leave his entire estate to his wife at his death, is within the Statute of Frauds. Consummation of the anticipated marriage is not alone such part performance as to avoid the operation of the statute and to render the contract specifically enforceable in equity. Watkins v. Watkins, 89 Atl. Rep. 253 (N. J. 1913). Even though a fraud be committed, a court of equity is powerless to give relief, by specific performance. Day v. Roby, 89 Atl. Rep. 305 (N. H. 1913).

The rule followed in these two recent cases has been steadfastly adhered to by the courts in England and the United States, where the fourth section of the English Statute of Frauds, or a similar enactment, is in force. Caton v. Caton, L. R. 2 H. L. 127 (Eng. 1867); Bradley v. Sadler, 54 Ga. 681 (1875); Austin v. Kuehn, 111 Ill. App. 506 (1904); Deshon v. Wood, 148 Mass. 132 (1888); Hunt v. Hunt, 171 N. Y. 396 (1902); Henry v. Henry, 27 Ohio, 121 (1875). A deed of conveyance, executed but not delivered before marriage, is sufficient writing to take a verbal agreement out of the operation of the statute. Wood v. Reed, 131 Mo. 553 (1895). A settlement after marriage in pursuance of a parol ante-nuptial promise is valid; Satterthwaite v. Emley, 41 N. J. Eq. 489 (1845); except as against creditors. Winn v. Albert, 5 Md. 66 (1851); *contra,* Hussey v. Castle, 41 Cal. 239 (1871).

Where there are independent acts of part performance in connection with a marriage, specific performance of a parol agreement, made in consideration of the marriage, will be decreed. Thus, if a father, in contemplation of the marriage of his daughter orally promises to give her a certain house as a present, and shortly after the ceremony puts her and her husband in possession, such possession constitutes sufficient part performance. Ungley v. Ungley, L. R. 4 Ch. Div. 73 (Eng. 1875); Duval v. Getting, 3 Gill, 138 (Md. 1845). *A fortiori,* where improvements are made following such a placing in possession, the verbal agreement will be speci-

fically enforced. Neale v. Neale, 76 U. S. 1 (1869). When through the fraud of the promisor, an irretrievable change of situation occurs, equity will grant relief. Peek v. Peek, 77 Cal. 106 (1888).

SPECIFIC PERFORMANCE—PAROL CONTRACT OF SALE OF LAND—The plaintiff, by parol, agreed to convey a good title to certain land to the defendant, free from incumbrance, except a ground rent. There was a mortgage on the property, but it was agreed that the defendant should have the possession and the use of the property until the plaintiff secured a release of the mortgage. The defendant entered and remained in possession, and also paid a part of the purchase price. *Held:* The contract was enforceable at the suit of the vendor. Caplan v. Buckner, 91 Atl. Rep. 481 (Md. 1914).

The authorities are ample to establish the doctrine that the mere fact that the vendor's property is incumbered, or his title is defective, at the time the contract of sale is made will not prevent his enforcing the contract in equity. Dresel v. Jordan, 104 Mass. 407 (1870); Miller v. Cameron, 45 N. J. Eq. 95 (1889). If he has removed the incumbrance and perfected the title by the time he is required by his contract to convey it. Luckett v. Williamson, 37 Mo. 397 (1866); Maryland Construction Co. v. Kuper, 90 Md. 529 (1900). And, generally, when he has acted in good faith relief will be granted him, if he is ready to furnish a clear title at the time of the decree, provided the delay has not prejudiced the purchaser and time is not the essence of the contract. Gibson v. Brown, 214 Ill. 330 (1905); Van Riper v. Wickersham, 76 Atl. Rep. 1020 (N. J. 1910). But, in a few States, it is held that the vendor must have title at the time of the contract. Luse v. Deitz, 46 Ia. 205 (1877).

The decisions are in conflict as to whether possession alone is sufficient to take the place of the writing required by the Statute of Frauds. In England, possession is held to be a sufficient act of part performance to satisfy the statute. Ungley v. Ungley, L. R. 5 Ch. Div. 887 (Eng. 1877). And the following American authorities favor the rule that an oral contract relating to real estate is taken out of the statute by delivery of possession. Wharton v. Stoutenburgh, 35 N. J. Eq. 266 (1882); Robinson v. Thrailkill, 110 Ind. 117 (1886); Calanchini v. Bransteller, 84 Cal. 249 (1890). Yet, in a respectable number of States, the English rule of part performance has been distinctly repudiated. Usher v. Flood, 83 Ky. 552 (1886); Fisher v. Kuhn, 54 Miss. 480 (1893); North v. Bunn, 122 N. C. 766 (1898). However, taking possession in pursuance of the contract together with payment in full or in part, of the purchase price is recognized, in nearly all the jurisdictions, as a sufficient part performance. Rovelsky v. Schener, 114 Ala. 419 (1896); Wilkins v. Miller, 171 Ill. 556 (1898).

TORTS—MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVICE OF COUNSEL—A sewing machine agent, acting upon the advice of the county attorney and two other attorneys whom he put in possession of the facts, instituted an action of embezzlement. The prosecution being dismissed, suit for malicious prosecution was commenced against the agent. *Held:* The court should have instructed the jury that the fact that the agent acted on the advice of counsel was a good defence. Sewing Machine Co. v. Dyer, 160 S. W. Rep. 917 (Ky. 1913).

It is well settled that advice of counsel will serve as a defence in a suit for malicious prosecution. Staunton v. Goshorn, 94 Fed. 52, 36 C. C. A. 75 (1899); Magowan v. Rickey, 64 N. J. L. 402, 45 Atl. Rep. 804 (1900). So a defendant in such action will not be liable if he has laid all the facts before an attorney and acted in good faith upon the opinion given by that attorney, even though such opinion was erroneous. Hall v. Suydam, 6 Barb. 83 (N. Y. 1849); Waiter v. Sample, 25 Pa. 275 (1855); Wakely v. Johnson, 115 Mich. 285 (1897). There must be a full and fair statement of all the facts within the knowledge of the prosecuting witness. Leahey v. March,

155 Pa. 458 (1893); Jones v. Morris, 97 Va. 43, 33 S. E. Rep. 377 (1899). And if facts within the knowledge of the prosecuting witness are not fully and fairly stated to the attorney, his advice will be no defence to the subsequent action for malicious prosecution. Roy v. Goings, 112 Ill. 656 (1885); Flora v. Russell, 138 Ind. 153, 37 N. E. Rep. 593 (1894); Webster v. Fowler, 89 Mich. 303, 50 N. W. Rep. 1074 (1891).

The counsel whose advice is sought and acted upon must be competent and reputable in the community. It is not enough that the one consulted has held himself out as an attorney at law and was believed to be such by the party consulting him. Murphy v. Larsen, 77 Ill. 172 (1875); Davis v. Baker, 88 Ill. App. 251 (1899). But he need not be described as "learned in the law." Horne v. Sullivan, 83 Ill. 30 (1876); O'Neal v. McKinna, 116 Ala. 606, 22 So. Rep. 905 (1897). Advice by a justice of the peace is not a good defence. Brobst v. Ruff, 100 Pa. 91, 12 W. N. C. 494 (1882); Beihoffer v. Loeffert, 159 Pa. 374 (1893).

TORTS—MINES AND MINING—PLUGGING ABANDONED WELL—The plaintiff, owner of a small tract of land, executed an oil and gas lease thereon. Gas was found in paying quantities. A lease on a large adjoining tract came into the hands of the defendant company, which thereupon drilled a well into the same strata of sand that supplied the plaintiff's well. Subsequently the defendant company abandoned their well without having plugged it or taken any precaution against its causing damage. In consequence water entered through the abandoned well into the gas-bearing strata of sand and impeded the flow of gas into the plaintiff's well so that it became worthless. *Held:* The defendant company is liable for the wanton and negligent injury to the plaintiff's gas well, as well as for the statutory penalty imposed for failure to plug an abandoned well. Atkinson v. Virginia Oil and Gas Co., 79 S. E. Rep. 647 (W. Va. 1913).

By statute in several States, as in West Virginia, a penalty is imposed for failure to plug an abandoned oil or gas well. W. Va. Code of 1906, chap. 62, sec. 2; Indiana Acts of 1893, c. 36, §§2, 3, 4 and 5, amended by Acts of 1899, c. 61 (Burns' Ann. Stat. 1901, §§7511, 7512, 7513, 7514); Kentucky Acts 1891-93, pp. 60, 61 (Ky. St. 1899, §§3910-3914); Pennsylvania Act of June 10, 1881, P. L. 110. But none of these statutes give an adjacent owner redress for damages arising out of a failure to comply with the statute. In the lack of precedent and dearth of authority on the point involved, the court in the principal case decided that the defendant company was liable for the injury arising from its compliance with the statute, by analogy to the general principle that an owner cannot rightfully pollute percolating waters in his premises so as to injure or destroy streams or wells supplied therefrom on adjacent property. Gilmore v. Salt Co., 84 Kans. 729, 115 Pac. Rep. 541, 34 L. R. A. (N. S.) 48 (1911); Collins v. Gas Co., 139 Pa. 111, 21 Atl. Rep. 147, affirming 131 Pa. 143, 18 Atl. Rep. 1012, 6 L. R. A. 280 (1890).

TORTS—RIGHT OF ACTION FOR SEDUCTION OF FIANCÉE—The seduction and debauching of a man's fiancée making proper the breach of the marriage contract by him, gives the affianced husband no cause of action against the seducer. Davis v. Condit, 144 N. W. Rep. 1089 (Minn. 1914).

The right of a husband to recover for alienation of his wife's affections is a right based upon the marital relation, and the loss of services suffered by the husband. Matheis v. Mazet, 164 Pa. 580 (1894). So too the right of action of a father to recover for the seduction of his daughter is based, theoretically at least, on loss of services. Milligen v. Long, 188 Pa. 411 (1898). By analogy to these two cases it would seem that an affianced husband could not recover for seduction of his fiancée because he could not show any loss of services. Neither could he recover on the theory that the seducer has wrongfully caused a breach of the marriage contract: the breach of contract was by the man, not by his affianced wife, and though

her conduct justified him in breaking it, yet that gives him no right of action against the seducer. See in accord Case v. Smith, 100 Minn. 229 (1895).

TORTS—UNFAIR COMPETITION—A furniture company had the agency for the White Sewing Machine. The agency was taken away from it and given to the plaintiff in the same city, whereupon the furniture company, for the purpose of injuring the plaintiff in his business, wrongfully and maliciously advertised to the public that it would sell the same machine handled by the plaintiff at half the price at which he was offering them for sale. The jury found that the sole purpose of the furniture company in advertising as they did was to ruin the plaintiff in his business. *Held:* The competition was mere simulation, and carried out with malice to injure the plaintiff in his business and was therefore actionable. Boggs v. Duncan-Schell Furniture Company, 143 N. W. Rep. 482 (Iowa, 1914).

The rule of the common law has been that the existence of a malicious motive in the case of an act which is not in itself illegal will not convert the act into a civil wrong for which reparation can be recovered by the one injured. Allen v. Flood (1898), App. Cas. 1; Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 21 L. R. A. 337, 55 N. W. Rep. 1119 (1893); 2 Cooley on Torts (3rd Ed.), Chap. XXII, p. 830. But the tendency of the modern cases, with which the principal case is in accord, is to hold that when an act, altho otherwise lawful, is actuated by no legitimate trade purpose and solely with the malicious intent to injure the business of another it becomes unlawful and entitles the one injured thereby to recover. This rule has been applied where there has been an interference with contractual relations between the plaintiff and third persons. Van Horn v. Van Horn, 52 N. J. L. 484, 10 L. R. A. 184, 20 Atl. Rep. 485 (1890); Doremus v. Hennesey, 62 Ill. App. 391, 176 Ill. 608, 43 L. R. A. 797 (1898). And where there has been a conspiracy to ruin the plaintiff by ceasing to deal with him and inducing others to do the same. Delz v. Winfree, 80 Tex. 400, 16 S. W. Rep. 111 (1891); Ertz v. Produce Exchange, 79 Minn. 145, 42 L. R. A. 90, 81 N. W. Rep. 737 (1900). It has also been extended, as in the principal case, to cases of severe competition maliciously started for the purpose of driving the plaintiff out of business. Tuttle v. Buck, 107 Minn. 145, 22 L. R. A. (N. S.) 599, 119 N. W. Rep. 946, 131 Am. St. Rep. 446 (1909); Dunshee v. Standard Oil Co., 132 N. W. Rep. 371, 36 L. R. A. (N. S.) 263 (Iowa, 1912). Recovery has been allowed where an employer has maliciously ordered its employees to refrain from dealing with the plaintiff (an adjacent retailer) under threat of expulsion. Wesley v. Lumber Co., 97 Miss. 814, 53 So. Rep. 346 (1910). But see *contra,* Lewis v. Lumber Co., 121 La. 658, 46 So. Rep. 685 (1908).